Periasamy & Anor v Public Prosecutor

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 41–97–92
VISU SINNADURAI J
14 MAY 1993

Criminal Law *— Rioting when in possession of weapon — Ingredients of offence — Penal Code (FMS Cap 45) s 148*

Criminal Procedure *— Charge — Defective charge — Charge disclosing no offence — Whether curable — Whether there was miscarriage of justice against accused — Criminal Procedure Code (FMS Cap 6) s 422*

Criminal Procedure *— Appeal — Appeal against conviction and sentence — Defective charge — Charge disclosing no offence — One accused pleaded guilty and not party to appeal — Whether conviction and sentence against all accused should be quashed and set aside — Approach to be taken by court — Criminal Procedure Code (FMS Cap 6) s 156*

The appellants (the second and third accused in the court below) who had been convicted in the magistrates' court for an offence of rioting with a deadly weapon punishable under s 148 of the Penal Code (FMS Cap 45) ('the Code') appealed against the conviction and sentence. Both the appellants were sentenced to one day's imprisonment and fined RM3,000 in default of which two months' imprisonment. The first accused who did not appeal had pleaded guilty earlier and was sentenced to two years' imprisonment.

Held, allowing the appeal:

(1) The charge as framed against the accused persons was defective as disclosing no offence in law since s 148 of the Code does not deal with the use of a deadly weapon in a riot which is likely to cause death. The said section makes no reference to the use of a deadly weapon nor does it provide that the weapon must be such that if used it is likely to cause death.

(2) Where an accused has been convicted under a defective charge which did not disclose an offence known to the law, the court may, firstly, regard the trial as a nullity without a retrial being ordered; or secondly, if the evidence discloses the commission of some other offence, order a retrial with a proper charge framed; or thirdly, instead of ordering a retrial, substitute the offence stated in the original charge for another offence under another section of the Code and convict the accused accordingly. But the last course of action should be done in limited circumstances and with great caution so as not to prejudice the case of the accused.

(3) From the evidence there was doubt as to whether the appellants were present at the scene and whether they were responsible for the injuries caused to the complainant. There was further doubt as to the actual weapon used in committing the offence especially since it was neither found nor tendered as an exhibit. Further, the

evidence of the first accused at the trial that the second and the third accused were not present at the scene, rejected by the magistrate, was sufficient to create some doubt in the prosecution's case.

(4) In the light of the inconsistencies in the testimony of the complainant, and in the absence of any other evidence to establish the ingredients of the offence that the accused persons did participate (a) in an unlawful assembly; (b) had a common object; (c) had used force or violence; and (d) had possession of a weapon, it was unsafe for the magistrate to have convicted the accused for the offence they were charged.

(5) Considering the totality of the evidence, and especially the unsatisfactory nature of the complainant's evidence, the defect in the charge cannot be cured by substituting the offence specified in the original charge for another nor by applying s 422 of the Criminal Procedure Code (FMS Cap 6). In the circumstances, a grave miscarriage of justice had been occasioned against the three accused persons. The convictions of the appellants were therefore quashed and set aside.

(6) In respect of the first accused who had earlier pleaded guilty and who was not a party to this appeal, the court exercised its revisionary powers in quashing and setting aside his conviction.

[Bahasa Malaysia summary

Perayu-perayu (si tertuduh kedua dan ketiga di mahkamah bawah) yang telah disabitkan di mahkamah majistret atas kesalahan merusuh dengan senjata yang boleh membawa maut yang boleh dihukum di bawah s 148 Kanun Keseksaan (FMS Bab 45) ('Kanun tersebut') telah merayu terhadap sabitan dan hukuman mereka. Kedua-dua perayu telah dijatuhkan hukuman penjara sehari dan denda RM3,000 jika ingkar membayar akan dipenjarakan selama dua bulan. Si tertuduh pertama yang tidak membuat rayuan telah mengaku salah sebelum itu dan telah dihukum penjara selama dua tahun.

Diputuskan, membenarkan rayuan itu:

(1) Pertuduhan seperti yang dibentuk terhadap si tertuduh adalah cacat kerana tidak mendedahkan sebarang kesalahan dari segi undang-undang oleh sebab s 148 Kanun tersebut tidak menyebut tentang penggunaan senjata yang boleh membawa maut dalam sesuatu rusuhan yang boleh menyebabkan kematian. Seksyen tersebut tidak menyentuh penggunaan senjata yang boleh membawa maut dan juga tidak memperuntukkan bahawa senjata tersebut semestinya adalah satu senjata yang mungkin akan menyebabkan kematian jika digunakan.

(2) Apabila seseorang telah disabitkan di bawah satu pertuduhan yang cacat yang tidak mendedahkan sebarang kesalahan dari segi undang-undang mahkamah boleh pertama nya, menganggap perbicaraan itu tidak sah tanpa memerintahkan perbicaraan semula

A diadakan; atau keduanya, jika keterangan mendedahkan bahawa kesalahan yang lain telah dilakukan, memerintahkan perbicaraan semula diadakan dengan membentukkan pertuduhan yang sepatutnya; atau ketiganya, daripada memerintahkan perbicaraan semula, menggantikan kesalahan yang dinyatakan dalam pertuduhan asal itu dengan kesalahan yang lain di bawah seksyen B yang lain Kanun tersebut dan oleh demikian menyabitkan si tertuduh. Tetapi tindakan terakhir itu haruslah dilakukan dalam keadaan yang terhad dan dengan sungguh berwaspada supaya tidak memudaratkan kes si tertuduh.

(3) Daripada keterangan yang ada terdapat keraguan sama ada perayu C hadir di tempat kejadian jenayah itu dan sama ada mereka bertanggungjawab atas kecederaan pada diri pengadu. Terdapat keraguan selanjutnya tentang senjata yang sebenarnya telah digunakan untuk melakukan kesalahan itu lebih-lebih lagi kerana ia tidak dijumpai ataupun dikemukakan sebagai ekshibit. D Tambahan pula, keterangan si tertuduh pertama di perbicaraan itu bahawa si tertuduh kedua dan ketiga tidak hadir di tempat kejadian jenayah itu, yang telah ditolak oleh majistret, mencukupi untuk menimbulkan keraguan dalam kes pihak pendakwa.

(4) Melihat ketidaksejajaran dalam keterangan pengadu dan oleh sebab ketiadaan sebarang keterangan yang lain untuk membuktikan E unsur kesalahan bahawa si tertuduh telah turut serta (a) dalam suatu perhimpunan yang menyalahi undang-undang; (b) mempunyai tujuan bersama; (c) telah menggunakan kekuatan atau kekejaman; dan (d) memiliki suatu senjata, adalah tidak selamat bagi majistret untuk menyabitkan si tertuduh kerana F kesalahan dengan yang mana mereka telah dituduh.

(5) Menimbangkan keseluruhan keterangan itu, dan terutamanya sifat keterangan pengadu yang tidak memuaskan, kecacatan dalam pertuduhan itu tidak boleh diperbaiki dengan menggantikan kesalahan yang dinyatakan dalam pertuduhan asal itu dengan G kesalahan yang lain ataupun dengan memakai s 422 Kanun Acara Jenayah (FMS Bab 6). Dalam keadaan begitu, suatu salah laksana keadilan yang serius telah berlaku terhadap ketiga-tiga si tertuduh. Sabitan perayu-perayu oleh itu dibatalkan dan diketepikan.

(6) Berkenaan si tertuduh pertama yang telah mengaku salah sebelum H itu dan yang tidak menjadi pihak pada rayuan ini, mahkamah telah menggunakan kuasa penyemakannya dalam membatalkan dan mengetepikan sabitannya.]

Notes

For a case on rioting, see 4 *Mallal's Digest* (4th Ed) para 588.

I For cases on appeal against conviction and sentence, see 5 *Mallal's Digest* (4th Ed) paras 145–151 and paras 392–402 respectively.

For cases on defective charge, see 5 *Mallal's Digest* (4th Ed) paras 611–627.

Cases referred to

1 *Liaw Kwai Wah & Anor v PP* [1987] 2 MLJ 69 (refd)
2 *Manokaran & Anor v PP* [1979] 1 MLJ 262 (folld)
3 *Gurdit Singh v PP* [1983] 1 MLJ 264 (refd)
4 *Chong Chee Pak v PP* [1948–49] MLJ Supp 45 (folld)
5 *Lee Swee Tee v PP* [1960] MLJ 161 (refd)
6 *Cheah Yew Fatt & Anor v PP* [1960] MLJ xlvi (refd)
7 *C Mohammad v PP* [1974] 1 MLJ 25 (refd)
8 *PP v Lim Yoo Hock* [1984] 1 MLJ 309 (refd)
9 *PP v Choy Kok Kuan & Ors* [1959] MLJ 80 (refd)
10 *Sivalingam v PP* [1982] 2 MLJ 172 (folld)
11 *Tan Kheng Ann & Ors v PP* [1965] 2 MLJ 108 (refd)
12 *Mahinder Singh v PP* [1967] 1 MLJ 126 (folld)
13 *PP v Abdul Aziz* [1978] 2 MLJ 155 (refd)
14 *Ong Chin Seng & Anor v R* [1960] MLJ 34 (refd)
15 *PP v Anthony* [1972] 1 MLJ 229 (folld)
16 *Ang Leong v PP* [1985] 1 MLJ 239 (refd)
17 *PP v Hussain & Anor* [1970] 1 MLJ 37 (refd)
18 *Yap Sing Hock & Anor v PP* [1992] 2 MLJ 714 (folld)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 156, 166, 167, 422
Evidence Act 1956 s 133
Penal Code (FMS Cap 45) ss 141, 144, 146, 148, 159
Penal Code [Ind] ss 144, 148

K Ganesh (*K Ganesh & Associates*) for the appellants.

Mohd Hanafiah bin Zakaria (Deputy Public Prosecutor) for the respondent.

Visu Sinnadurai J: This is an appeal from the decision of the magistrate against the conviction and sentence of the two appellants. The two appellants Periasamy and Gunasegaran together with another (Suppiah) were charged as follows:

> Bahawa kamu sama-sama lima orang lagi yang masih bebas pada 10 Januari 1988 jam 4.30 ptg di Kg Loke Yew di dalam Bandaraya Kuala Lumpur, adalah ahli perhimpunan yang menyalahi undang-undang dan dengan niat yang sama di dalam perhimpunan tersebut dengan sengaja mencederakan Kumaroo @ Kumaran a/l Sathu KP: 8028232(B) telah melakukan kesalahan merusuh dengan *senjata bahaya iaitu rotan dan jika digunakan sebagai senjata untuk menyerang mungkin menyebabkan kematian.* Oleh yang demikian, kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s 148 Kanun Keseksaan (FMS Bab 45). (Emphasis added.)

During the course of the trial, the first accused (Suppiah) pleaded guilty and the trial proceeded against the two appellants. Both the appellants were found guilty and were sentenced to one day's imprisonment and a fine of RM3,000, in default of which a term of imprisonment for two months. The appellants appealed to this court against the decision of the magistrate both against sentence and conviction.

Facts

The key witness for the prosecution was the complainant. Except for the police witnesses, no other witness testified at the trial. The facts of the case therefore as obtained from the complainant's evidence are as follows. The complainant said that on 10 January 1988 at about 4.30pm he was driving his car along Jalan Setapak, Kuala Lumpur. When he approached Kampung Loke Yew, the exact location of which he could not confirm, but however said it was near Jalan Gurney, Cheras, Kuala Lumpur, he said that seven persons stopped his car. All seven persons were said to be of Indian origin and he said that one of them by the name of Murugesu questioned him regarding a police report which the complainant had made against Murugesu's nephew.

He said in evidence that he was then hit with a 'rotan yang ada besi di hadapannya (rotan hose)'. He, however, said he was not sure as to who else hit him, except for Murugesu. He then ran away. After 10 or 15 minutes, he returned to the scene of the incident and drove his car home before going to the Tun Razak Police Station to make a police report of the incident. He then said that he went to the hospital to the out-patient clinic for medical treatment for his injuries.

The complainant said that he knew all six persons who attacked him except for one. He said he had known them since he was small.

In an identification parade subsequently conducted by the police, he identified the three accused persons.

I should perhaps point out at this stage that from the notes of evidence, it is evident that the complainant was not consistent in his evidence. Some of the inconsistencies are as follows: In his police report, he had said that there were eight persons who had stopped his car. However, later he said there were seven persons who were present and again later he changed his mind and said there were about seven to eight persons. In giving evidence in court, he said that on the date in question, he was driving his car home. However, in his police report, he said he was on his way to buy four-digit numbers. And again during cross-examination, he said he was not sure where he was going.

Another inconsistency is that, in evidence he said he was taken to the hospital by the police. Later, he said he was not sure who drove him to the hospital, and again later on re-examination, he said he drove the car himself. Furthermore, the complainant at first said that the accused had attacked him with a knife and a stick. Later, he said he was attacked with a wooden stick.

To several inconsistencies in his evidence pointed out to him by the defence, he admitted in cross-examination that he was unsure of certain events as he could not remember them.

Inspector Ravendran (SP2), said that all three accused were arrested on 12 January 1988. Inspector Rahmat (SP3), the investigating officer said that he did not know anything about this case. He said he did not visit the scene where the offence was alleged to have been committed nor did he recover any items from the scene. Inspector Rahmat said that he was not sure whether the three accused were involved in the commission of any

offence except from the report made by the complainant. He also said he did not verify certain information given by the complainant.

Inspector Chua (SP4) said that he arranged for an identification parade on 15 January 1988 at Cheras Police Station. The complainant was there and the three accused were identified by the complainant. When questioned as to the need for the identification parade when the complainant had already said that he knew the assailants and could identify them, Inspector Chua merely said that the identification parade was conducted because an offence had been committed under s 148 of the Penal Code (FMS Cap 45), and that other than that he was not sure why this parade was conducted.

Even though no police investigation was conducted, all three accused persons were held in remand for 11 days.

At the end of the prosecution's case, after counsel for the accused had made his submissions on a no case to answer, the prosecution applied to the court to amend the charge. The charge was amended by substituting for the words 'pisau dan kayu' with the word 'rotan'. No other amendments were made to the charge.

After hearing arguments by the prosecution, the magistrate called upon the accused to make their defence.

The defence

The first accused (Suppiah)

The first accused said that he knew the complainant. On the day in question he and the third accused were on their way to play football when they saw a crowd at a coffee shop. He, however, said he was not sure what had happened. He denied any knowledge of or involvement in the incident.

The second accused (Periasamy)

The second accused also said that he knew the complainant. However, on the day in question he was on shift duty and finished work at two o'clock in the afternoon and reached home at about 4pm. He said there was a family misunderstanding between the complainant's family and his sometime before the incident. He denied any knowledge of the incident and said that probably the complainant had accused him because of the earlier family misunderstanding.

The third accused (Gunasegaran)

The third accused also said that he knew the complainant. He too denied any knowledge of or any involvement in the incident except that when he and Suppiah were at the playing field, they saw a crowd nearby.

The trial

During the course of the trial, the court was informed that the first accused had been arrested and was therefore unable to be present in court. After an adjournment and when the trial resumed, some three months later, the first accused pleaded guilty. The magistrate's note states that the charge was read to the first accused, explained and he was said to have understood the consequences of the plea. The magistrate then sentenced the first accused to two years' imprisonment.

Evidence of the first accused

When the case resumed, the first accused was recalled as a witness at the request of the defence and he gave evidence stating that at the scene of the incident, the second and third accused were *not* present. The first accused said that he was present together with another person called Pragesu. He denied that he was giving this evidence in favour of the second and the third accused so as to assist the two accused.

Findings of the magistrate

The learned magistrate came to the following conclusions: (i) despite the contradictions in the evidence of the complainant, she was satisfied that there was no doubt that there were more than five persons involved in the riot; (ii) without stating the actual facts, she held that the case fell within the ambit of the fourth paragraph of s 141; (iii) that it was clear that a rotan was used as a weapon; (iv) each of the persons present at the riot had used force on the complainant; (v) because the complainant had identified the three accused, the three accused were present at the riot; (vi) that in cases such as this, it was common for the weapon not to be found; (vii) that all the three accused were armed with the rotan hose as confirmed by the medical report; (viii) the evidence of the first accused that the second and third accused were not present could not be accepted.

The second and third accused were sentenced to one day's imprisonment and a fine of RM3,000, and in default of which two months' imprisonment.

The second and third accused now appeal against sentence and conviction.

The appeal

On appeal, counsel for the appellants raised a number of grounds to show that the learned magistrate had erred both in fact and in law. Much of these grounds was based on the argument that the findings of the learned magistrate were not substantiated by any evidence, or on the ground that they were based entirely on the uncorroborated evidence of the complainant, which in any case, was riddled with inconsistencies. However, neither counsel for the appellants nor the learned deputy public prosecutor drew to the attention of this court the validity of the charge.

Without considering the merits of the arguments raised by counsel for the appellants, it is pertinent for me, at this stage to consider whether the charge was defective. In so doing, I exercise my revisionary powers as provided for by the Courts of Judicature Act 1964 and the Criminal Procedure Code (FMS Cap 6). As to the powers of revision of the High Court, see the views expressed by the Supreme Court in *Liaw Kwai Wah & Anor v PP*.[1] See also Abdoolcader J in *Manokaran & Anor v PP*,[2] Mohamed Dzaiddin J (as he then was) in *Gurdit Singh v PP*.[3]

The charge

As stated earlier, the charge against the three accused was that they by participating in a riot armed with a knife and stick, being a deadly weapon, which if used, was likely to cause death, had committed an offence under s 148 of the Penal Code (FMS Cap 45). But as pointed out earlier also, the

charge was subsequently amended by deleting the words 'pisau dan kayu' to merely 'rotan'. Section 148 of Penal Code provides as follows:

> Any person who attends, takes part in or is found at any riot and who has in his possession at such riot any firearm, ammunition, explosive, corrosive, injurious or obnoxious substance, stick, stone or any weapon or missile capable of use as a weapon of offence shall be punished with imprisonment for a term which may extend to five years, or with fine, or with both.

It will be seen that there appears to be an error in the charge as framed against the accused insofar as it relates to s 148. Section 148 of the Malaysian Penal Code does *not* deal with the use of a deadly weapon in a riot which is likely to cause death. Section 148 makes no reference to the use of a *deadly* weapon nor does it provide that the weapon must be such that if used it is likely to cause death.

It therefore appears that the prosecution has invoked the wrong provision in the Penal Code in framing its charge against the accused. In fact, it would appear that the prosecution has invoked s 148 of the Indian Penal Code, rather than s 148 of the Malaysian Penal Code. Section 148 of the Indian Penal Code is entirely different to that of s 148 of the Malaysian Penal Code. Section 148 of the Indian Penal Code reads as follows:

> Rioting, armed with deadly weapon:
>
> Whoever is guilty of rioting, being armed with deadly weapon or with anything which, used as a weapon of offence, is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

There is no such similar provision under the Malaysian Penal Code. Quite obviously, the prosecution appears to have relied on the specimen of the charge under s 148 of the Indian Penal Code as contained in *Ratanlal's Law of Crime*, in framing the present charge.

It therefore appears to this court that the accused had been charged under a defective charge, insofar as the charge did not disclose any offence existing under our laws.

Defective charge

I now move on to consider the effect of this defect on the trial before the magistrate and of the convictions of the accused persons.

Section 156 of the Criminal Procedure Code (FMS Cap 6) provides that any defect in a charge shall not be regarded as material 'unless the accused was in fact misled by such error or omission'. In a number of cases, the courts have been called upon to consider the scope of this section: See generally 5 *Mallal's Digest* (4th Ed) paras 611 onwards.

The question in the instant case is whether the defect in the charge as framed is material within the meaning of s 156 of the Criminal Procedure Code. The courts generally have held that where a person has been wrongly charged under a repealed law, the charge was illegal and any conviction under it should be set aside (see 5 *Mallal's Digest* (4th Ed) paras 827, etc).

In other cases, where the accused was convicted under a wrong charge, the court in considering whether the accused has been misled had either substituted a proper charge or held the trial to be a nullity.

A There are, however, only a handful of cases where an accused, as in the present case, had been charged for an offence which did not exist under the Penal Code or any other law in force.

Chong Chee Pak v PP,[4] was one of the earliest decisions where the court had to consider the effect of a charge which did not disclose an offence known to the law. In this case, the accused was convicted on a charge of, B 'assisting in the management of a public lottery'. It was held by Callow J that as there was no such offence under the then s 4(1)(c) of the Common Gaming Houses Enactment (Cap 47), the conviction of the accused was a nullity. The only offence defined by the said section were: (i) having the care and management of a place kept or used as a common gaming house; C (ii) assisting in the management of such a place; and
(iii) assisting in carrying on a public lottery. Callow J observed, inter alia, at p 46:

> ... s 152(i) [of the Criminal Procedure Code] demands that the charge states the offence, not, I think, in language from which the accused should infer the nature D of the charge, but in terms precise and accurate.

His Lordship then continued (at p 47):

> The appellant faced trial on a charge not known to law; had it been a legitimate charge, though the facts proved another offence, I would have considered altering the charge ...
>
> E Nor can I order a retrial, for the charge in the court below being one without the law, it follows that the proceedings were a nullity ... the retrial of a nullity is an impossibility.

A similar view was expressed by Rigby J in *Lee Swee Tee v PP*.[5] See also *Cheah Yew Fatt & Anor v PP*[6] and *C Mohammad v PP*.[7]

F In cases, however, where the facts disclosed establish that an accused who had been convicted on a charge which was defective as it did not constitute an offence but, could have been charged under a different provision of the law, a retrial may be ordered: see *PP v Lim Yoo Hock*[8] per Edgar Joseph Jr J (as he then was). Similarly, it has also been observed by the then Court of Appeal that even though the charge disclosed no offence, G but if during the trial there was evidence to indicate that the accused could have been convicted of another offence, the defect in the charge might have been cured by the application of s 156 of the Criminal Procedure Code: see *PP v Choy Kok Kuan & Ors*.[9]

Therefore, it appears that in such a situation where the charge is defective as not disclosing an offence known to the law, the courts may regard the H trial as a nullity without a retrial being ordered; or if it appears to the court that the evidence discloses the commission of some other offences, a retrial may be ordered with a proper charge being framed.

There is, however, another approach which the High Court may take when considering an appeal against conviction. This is when the High Court, instead of ordering a retrial, substitutes the original charge for I another offence under another section of the Penal Code and convicts the appellant accordingly.

The powers of the High Court, however, to alter a finding in an appeal against conviction from the lower court is clearly provided for under the

Criminal Procedure Code. These powers of the High Court, in such circumstances, was considered by the then Federal Court in *Sivalingam v PP.*[10] Abdul Hamid FJ (as he then was) observed as follows at p 174:

> [T]o warrant a substitution there must be clear evidence that a case for the substituted offence would have been made out or established against the accused in the court below. To put it in another way before there can be an alteration of a finding, the appellate court must be satisfied that if the substituted charge had in fact been the original charge, the proceedings at the trial would have taken the same course, and the evidence recorded have been the same.

Abdul Hamid FJ emphasized that the High Court in altering or substituting a finding based on another charge must be cautious in so doing and it must be made subject to ss 166 and 167 of the Criminal Procedure Code. His Lordship said at p 174:

> What is clear in our minds is, and we emphasize, that such power must be exercised under limited circumstances and with great caution subject to the restriction imposed by s 167 of the Criminal Procedure Code, and it must be done so as not to prejudice the case of an accused.

Bearing these principles in mind, I now have to consider the effect of the defective charge in this case: whether (a) the trial should be declared a nullity; or (b) whether a retrial should be ordered with the charge being amended to another offence; or (c) whether to dismiss the appeal against conviction and sentence, and then to proceed to substitute the offence stated in the charge to another offence under a different section of the Penal Code. Before I can decide upon which of these courses I should adopt, the evidence in the present case as found by the magistrate need to be studied closely to determine whether the facts indeed disclose the commission of any other offence.

The accused were charged, albeit wrongly, for the possession of a deadly weapon which was likely to cause death at a riot. The main ingredient of such an offence is, of course, possession of a (*deadly*) weapon.

From the notes of evidence, it is unclear whether it could be established beyond a reasonable doubt that the accused persons were present at the incident and whether they were responsible for the injuries caused to the complainant. There is further doubt as to the actual weapon used in the commission of the offence, especially so in the light of the evidence that the weapon allegedly used by the accused was not found nor tendered as an exhibit in court. It should be borne in mind that the charge, however, was amended by the prosecution from the use of knife and 'kayu' to one of a rotan only, thereby suggesting the inconsistencies in the complainant's story.

The prosecution, however, did not when it made this amendment to the charge when the evidence surfaced at the trial that no knife was in fact used, review the facts of the case to consider whether at that stage a different charge should have been substituted.

There are also certain other aspects of this case, especially relating to the charge, the evidence and to the trial which I must refer to. Firstly, the accused persons were charged for rioting. Rioting as defined under the

A Penal Code in s 146 is an unlawful assembly where any member thereof uses force or violence. Therefore, in considering the proper charge to be framed against the accused persons, the prosecution ought to consider whether there was an assembly of five or more persons as required by s 141, and whether the common object of those persons was one within those objects which are specified in s 141. It should be borne in mind, that all B persons participating in the unlawful assembly must share a common object: see the well-known case on rioting at the Pulau Senang Settlement, *Tan Kheng Ann & Ors v PP.*[11] Secondly, an unlawful assembly becomes a riot only if force or violence is used (s 146). Section 148 creates a greater offence of rioting, if any person who attends an unlawful assembly is in C possession of a weapon.

In the present case, the entire evidence for the prosecution rests on the evidence as adduced by the complainant. As a result of his statement to the police, only three persons were charged as the other persons were not found by the police. The prosecution at this stage should have considered whether in the absence of the other persons who allegedly participated in the D commission of the crime, the ingredients of the offence of unlawful assembly were present. As to the number of persons and their identity was based entirely on the statements made by the complainant, further investigation by the police was necessary to verify the complainant's story. As to the dangers of convicting an accused based on the evidence of the complainant E alone, especially when the complainant had given contradictory answers as to the identity of the assailants and the weapon used, see the Federal Court case in *Mahinder Singh v PP.*[12] Ong Hock Thye FJ in this case observed at pp 127–128:

> When the above self-contradictions are considered — which, we regret to say, F was not done by the trial judge at all — there can no longer be that degree of satisfaction of guilt of an accused person which alone can justify a verdict of guilty.

Next, before the prosecution could frame a charge on rioting, the prosecution must be satisfied that there was some injury caused to the complainant, by the use of force or violence by five or more persons. It would appear that in G the instant case, that just because the accused had said he was hit originally with a knife and stick, and later he changed his mind and said that it was with a rotan, the prosecution was satisfied that a weapon was used, and therefore decided to prosecute the accused for an offence of rioting with the use of a weapon.

H Quite clearly, the basis upon which the prosecution has decided to frame its charge has been based entirely on the statements made by the complainant. It should be remembered that no weapon was in fact found. Nor was there any police investigation done to ascertain whether there were any other independent witnesses. Furthermore, as to whether the prosecution could establish that a common object was shared by the accused persons in I pursuance of the unlawful assembly appears to have been overlooked. The complainant in his own evidence had said that he was driving from Setapak and that when he reached Cheras he was attacked. At first, he said he was on his way home, and later, he said he was not on his way home but was on

his way to buy four-digit numbers. If that was so, how then could the accused persons have known that the complainant would be travelling from Setapak to Cheras on that specific date and time? In other words, the accused could not have pre-planned to cause hurt to the complainant on that date when they did not know that the complainant would be in Cheras.

In the light of the inconsistencies in the testimony of the complainant, and in the absence of any other evidence to establish that the accused persons did participate (a) in an unlawful assembly; (b) had a common object; (c) had used force or violence; and (d) had possession of a weapon, it appears to this court that it was unsafe for the magistrate to have convicted the accused for the offence they were charged.

I should also point out that the magistrate appears to have rejected the evidence given by the first accused (who had earlier pleaded guilty), that the second and third accused were not present during the commission of the alleged offence on the ground that he should have stated so earlier in the trial and not at that late stage. The first accused is a competent and a compellable witness for those tried jointly with him: see s 133 of the Evidence Act 1950 and *Cross on Evidence* (6th Ed) at p 196. In any case, this evidence given by the first accused appears to be sufficient to create some doubt in the prosecution's case.

I may also observe that in recording the plea of guilty by the first accused, the magistrate appears not to have recorded the facts of the case to which the first accused pleaded guilty. As to the importance of this, see the case of *PP v Abdul Aziz*.[13]

I would take this opportunity to observe that both the prosecution and the learned magistrate relied upon para 4 of s 141 to establish the participation of the accused in the unlawful assembly. It would appear that in cases such as this, especially when hurt had been caused to another person, it would have been more appropriate to rely on the third paragraph. In *Ong Chin Seng & Anor v R*,[14] it was held that the words 'other offence' covers all other offences provided.

The position under the Malaysian Penal Code is the same except that the weapon used at the unlawful assembly or at the riot need not be a deadly weapon. In the present case, there is no clear evidence to show which one of the accused had actual possession of the rotan. In any case, whether more than one rotan was in fact used was also not established in court. Therefore, the defect in the charge could not be cured merely by deleting the words in the charge relating to a deadly weapon.

Conclusion

In conclusion, considering the totality of the evidence, and especially the unsatisfactory nature of the complainant's evidence, the defect in the charge cannot be cured by substituting the offence specified in the original charge for one of unlawful assembly under s 141, or affray under s 159 of the Penal Code, or even of causing hurt. In the light of the evidence as available before this court, it is doubtful whether the commission of any one of these offences could be established.

A It appears to this court that considering all these factors, a grave miscarriage of justice has been occasioned against the three accused persons in this case. I am, therefore, unable to take any other course of action except to order that the convictions of the two accused be quashed and set aside. As I have not considered the merits of the appeal, and as I have based my decision wholly on the defective charge, I make this order in exercise of my B revisionary powers.

As far as the first accused is concerned, as he had earlier pleaded guilty and is not a party to this appeal, in exercise of my revisionary powers, I also order that his conviction be quashed and set aside. A similar approach was taken by Sharma J in *PP v Anthony*[15] where the conviction of an accused C person who had also pleaded guilty was quashed as the charge was found to be baseless. See also the approach taken by Gunn Chit Tuan J (as he then was) in *Ang Leong v PP*[16] and Ong Hock Sim J in *PP v Hussain & Anor.*[17] In *Manokaran & Anor v PP*,[2] Abdoolcader J observed at p 263:

> I would merely add that, in my view, notwithstanding the provisions of s 305 of D the Criminal Procedure Code, an appeal against a conviction on a plea of guilty will still lie if the charge discloses no offence in law, in which event the conviction itself would be illegal and a nullity.

I may add that in taking the view as I have, I have also relied on the recent Supreme Court decision in *Yap Sing Hock & Anor v PP.*[18] The Supreme E Court, in refusing to amend a charge which had not adhered to the wording of the relevant section of the Penal Code, observed at p 725:

> [A] court in a criminal case would have, generally speaking, to balance the interests of the prosecution on the one hand against those of the accused on the other.

F On the question as to whether I should apply s 422 of the Criminal Procedure Code, I also follow the views expressed by the Supreme Court in *Yap Sing Hock*'s case.[18] Peh Swee Chin SCJ, in delivering the judgment of the Supreme Court, said at p 725:

> The error or what looks like an error in the instant case seems to be technical. G Whether any court should apply s 422 aforesaid will depend, among other things, on whether the irregularity involves the breach of a principle of general importance to the administration of criminal justice. If it does, the court would not apply s 422, as this appears to us to be the same thing as the irregularity having occasioned a failure of justice. It is a fundamental principle in our law that the prosecution has to prove every ingredient of the offence or charge beyond a H reasonable doubt.

I therefore accordingly order that as the charge as framed against the three accused is defective as disclosing no offence in law, the conviction and sentence of the first accused (Suppiah), the second accused (Periasamy) and the third accused (Gunasegaran) be quashed and set aside and the fine, I if paid be refunded to them.

Appeal allowed.

Reported by Aslam Zainuddin